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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Feb 01, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

WILLIAM MCCLAIN, an individual,

No. 2:23-CV-00310-MKD

Plaintiffs,

ORDER DISMISSING CASE
WITHOUT PREJUDICE

v.

GARCO CONSTRUCTION, INC., a Washington State Corporation; ERIC JONES (an agent of Garco Construction, Inc.); JUSTIN LUDWIG (an agent of Garco Construction, Inc.); ERIC JONES (an agent of Garco Construction, Inc.); and TIM HUTTON (an agent of Garco Construction, Inc.),

Defendants.

The following procedural history is taken from Defendants' Notice of

Removal and the state court records attached thereto, which are the only materials before the Court that set forth the procedural history of this case.

On August 15, 2022, Plaintiff filed a Charge of Discrimination against Defendant Garco Construction, Inc. ("Garco") with the Equal Employment

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1 Opportunity Commission (EEOC), raising claims related to Plaintiff's work for
2 Garco in March 2022. ECF No. 1 at 2.

3 On May 26, 2023, Plaintiff filed a Complaint against Defendants Garco, Eric
4 Jones, Justin Ludwig, and Tim Hutton in Spokane County Superior Court case
5 number 23202122-32. ECF No. 1-2 at 2-11. The Complaint asserted claims for
6 violations of three provisions of RCW ch. 49.60, hostile work environment,
7 retaliation, intentional infliction of emotional distress, negligent infliction of
8 emotional distress, and defamation. *Id.*

9 On June 8, 2023, Garco learned about the state case when the EEOC
10 dismissed the related proceedings because Plaintiff had filed a lawsuit on the
11 matter. ECF No. 1 at 3. Garco's counsel reportedly communicated with Plaintiff's
12 counsel and offered to accept service on Garco's behalf if Plaintiff provided an
13 Acceptance of Service form. *Id.*

14 On July 18, 2023, Plaintiff filed an Amended Complaint in the state case.
15 ECF No. 1-2 at 15-24. On July 19, 2023, someone from Plaintiff's counsel's
16 office delivered a "courtesy copy" of this Amended Complaint to the office of
17 Garco's counsel but did not provide an Acceptance of Service form. ECF No. 1 at
18 3-4.

19 In August 2023, Garco's counsel also began representing Mr. Jones, Mr.
20 Ludwig, and Mr. Hutton in this matter. ECF No. 1 at 4.

1 On October 5, 2023, Plaintiff filed a Second Amended Complaint in the
2 state case. ECF No. 1-2 at 29-38. On October 9, 2023, someone from Plaintiff's
3 counsel's office again delivered a "courtesy copy" of this Second Amended
4 Complaint to the office of Defendants' counsel. ECF No. 1 at 4. Also on October
5 9, 2023, Plaintiff filed an Affidavit of Personal Service in the state case. ECF
6 No. 1-2 at 39. The Affidavit indicated that Erika Murphy served the "Complaint
7 for Damages" in that case "to the receptionist" at Defendants' counsel's office on
8 October 9, 2023. *Id.* Ms. Murphy's signature was dated September 28, 2023. *Id.*

9 On October 26, 2023, Defendants removed this matter from Spokane County
10 Superior Court. ECF No. 1. Defendants stated they still had not received proper
11 service of process under RCW 4.28.080 or Wash. Super. Ct. Rule 4 and disclaimed
12 any waiver of service of process by removing the case. ECF No. 1 at 4-5, 4 n.2.
13 The parties did not file anything further for several weeks.

14 On December 11, 2023, the Court set a status conference for December 14,
15 2023, to determine the status of this matter. ECF No. 4. Joseph Kuhlman
16 appeared by telephone on Plaintiff's behalf. Abigail Maurer-Lesser and William
17 Symmes appeared on Defendants' behalf, while maintaining Defendants'
18 objections to service of process.

19 At the hearing, the Court noted that almost two months had elapsed since the
20 case was removed, and far longer had elapsed since Plaintiff filed the initial

1 Complaint on May 26, 2023. Mr. Kuhlman stated he would be filing an affidavit
2 of service and was otherwise evaluating how to proceed with the matter. The
3 Court advised Mr. Kuhlman that it was Plaintiff's burden to effectuate or otherwise
4 prove service and continue to prosecute the case, and that if Plaintiff did not do so
5 within 45 days, that the Court would dismiss the matter for failure to prosecute.
6 ECF No. 5. Mr. Kuhlman confirmed his understanding.

7 Plaintiff has not filed anything since the December 14, 2023, status
8 conference.¹

9 Pursuant to Fed. R. Civ. P. 4(m), “[i]f a defendant is not served within 90
10 days after the complaint is filed, the court--on motion or on its own after notice to
11 the plaintiff--must dismiss the action without prejudice against that defendant or
12 order that service be made within a specified time.” Additionally, “[i]t is within
13 the inherent power of the court to sua sponte dismiss a case for lack of
14 prosecution.” *Ash v. Cvetkov*, 739 F.2d 493, 496 (9th Cir. 1984), *cert. denied*, 470
15 U.S. 1007 (1985) (citing *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962)). “When
16 considering whether to dismiss a case for lack of prosecution, the district court
17 must weigh the court’s need to manage its docket, the public interest in expeditious
18 resolution of litigation, and the risk of prejudice to the defendants against the

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¹ Indeed, Plaintiff has not filed anything in this matter since it was removed.

1 policy favoring disposition of cases on their merits, and the availability of less
2 drastic sanctions.” *Id.* (citations omitted).

3 As of the date of this Order, more than 250 days have elapsed since Plaintiff
4 filed the first Complaint in state court on May 26, 2023. *See* ECF No. 1-2 at 2. 98
5 days have elapsed since this matter was removed. *See* ECF No. 1. 49 days have
6 elapsed since the Court advised Plaintiff’s counsel to file a proof of service or
7 otherwise move forward with this case. *See* ECF No. 5. This matter is well past
8 the 90-day period for service of process under Fed. R. Civ. P. 4(m). Moreover, the
9 Court expressly warned Plaintiff’s counsel that this matter would be dismissed if
10 Plaintiff took no further action.

11 The Court’s need to manage its docket, the public interest in expeditious
12 resolution of litigation, and the risk of prejudice to Defendants—particularly in
13 light of the efforts Defendants’ counsel have made since they first became aware of
14 the state case in June 2023—outweigh the policy favoring disposition of cases on
15 their merits. *See Ash*, 739 F.2d at 496. A plaintiff’s “fail[ure] to respond . . . in
16 any way,” when given notice of an impending dismissal and an opportunity to
17 prevent that dismissal, may be construed as “indicative of his interest in the entire
18 case.” *See id.* at 497. Moreover, the Court concludes that no “less drastic”
19 sanction is available or appropriate, particularly given that this dismissal is without
20 prejudice. *See id.* at 496-97.

Accordingly, IT IS ORDERED:

1. For the reasons set forth above, this action is **DISMISSED** without prejudice.

IT IS SO ORDERED. The District Court Executive is directed to file this order, provide copies to the parties, and **CLOSE** the file.

DATED February 1, 2024.

s/Mary K. Dimke
MARY K. DIMKE
UNITED STATES DISTRICT JUDGE